other things. The lesson of BellSouth should be clear: Courts are more than capable of fulfilling their responsibilities under Section 332(c)(7), and there is simply no reason for the Commission to enter into the constitutional, statutory, and jurisdictional thicket that its proposal to "look behind" local zoning decisions would create.[8]

## II. THE COMMISSION SHOULD EXERCISE JURISDICTION UNDER SECTION 332(c)(7)(B)(iv)-(v) ONLY WHERE A LOCAL DECISION IS ON ITS FACE BASED ON RF EMISSIONS AND THE FACILITIES AT ISSUE ARE IN COMPLIANCE WITH FCC RULES.

The industry's concerns that appear to animate the NPRM's proposals concerning "partial preemption" and "looking behind" local decisions might be a bit more understandable had Congress left wireless providers without a remedy absent Commission review. But Congress, of course, did not do that. Rather, it gave industry a court remedy -- a remedy that the statute and the legislative history make clear was Congress' preferred remedy. And there is no reason to believe that remedy is inadequate.

Even if the Commission felt that the court remedy Congress gave is inadequate, it would lack to the ability to alter

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[8] The NPRM also asks (at ¶ 141) whether the Commission's authority under Section 332(c)(7)(B)(v) extends to efforts by private entities, such as homeowner associations and private land covenants, to restrict placement of wireless facilities. The short answer is no. As an initial matter, the Commission's authority under subparagraph (v) is limited to RF matters, and most private restrictions are not likely to be based on RF concerns. But even if they were, such restrictions are -- as the NPRM concedes -- made by "non-governmental entities." The actions of homeowner associations and other private landowners can in no sense be considered the actions of a local government. Local governments have no control over, and thus should have no responsibility for, such actions.

Congress' determination. The Commission is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." MCI Telecommunications v. AT&T, 114 S.Ct. 2223, 2232 n.4 (1994).

To respect the jurisdictional line Congress has drawn, the Commission should therefore exercise its limited authority under Section 332(c)(7)(B)(iv)-(v) by reviewing only local zoning decisions about wireless facilities that are, on their face, based on RF emission. Any other approach would threaten to upset the jurisdictional balance Congress struck between the courts and the Commission.

To be sure, we suspect that industry will assert that local governments might engage in subterfuge by issuing decisions ostensibly based on factors other than RF emissions when it fact the decision is based on RF emissions. But that concern is unwarranted, and in any event, courts provide a more than adequate forum to resolve such claims. As an initial matter, the Commission must remember that local governments are public bodies whose deliberations (unlike those of wireless providers) must be public. Also unlike wireless providers, local governments are answerable not only to the court but to their constituents. And even in the unlikely event that a local government decision were based sub rosa on RF emissions, providers have a more than adequate remedy: courts have jurisdiction over RF disputes as well under subparagraph (iv), are in a far better position than

the Commission to sift through and weigh the evidence in the event of a factual dispute, and will not hesitate to grant relief to a wireless provider where appropriate. See, e.g., BellSouth, supra.

## III. THE NPRM's PROPOSALS ON DEMONSTRATION OF RF COMPLIANCE SHOULD BE MODIFIED TO PLACE THE BURDEN OF DEMONSTRATING COMPLIANCE ON WIRELESS PROVIDERS.

NLC and NATOA applaud the NPRM's tentative conclusion (at ¶ 142) that "it is reasonable for state and local governments to inquire as to whether a specific personal wireless service facility will comply with [FCC] RF emission guidelines."

The touchstone for any RF testing and documentation mechanism adopted by the Commission must be that it ensures public safety. The Communications Act, 47 U.S.C. § 151, as well as Section 704(b) of the Telecommunications Act of 1996, obligate the Commission not only to adopt RF emission standards, but also to adopt monitoring and compliance procedures and mechanisms sufficient to ensure that wireless providers are in fact complying with those RF standards.

In fashioning procedures to govern demonstrating RF compliance, the Commission must keep in mind that many members of the public have genuine concerns and fears about the health risks associated with exposure to RF emissions. It is not a sufficient answer to these concerns for the government -- whether that government is the Commission, or any other federal, state or local governmental body -- to tell the public to "trust us; we are the experts; we are protecting you." Rather, the public is

entitled to some reasonable explanation that they can understand and that provides them with reasonable assurance that a particular wireless facility has been tested and is in fact complying with FCC standards.

With this principle in mind, we now turn to the NPRM's RF compliance demonstration proposals.

### A. The Commission Must Allow Local Governments To Require Providers To Demonstrate RF Compliance.

The NPRM presents two alternative showings concerning RF compliance that local governments could require wireless providers to provide as part of the local approval process. Under the first alternative, local governments would be allowed to require a wireless provider to furnish: (1) in the case of facilities not categorically excluded, copies of all documents the provider submitted to the FCC concerning RF emissions during the FCC licensing process; and (2) in the case of categorically excluded facilities, a written certification of compliance with FCC RF rules. NPRM at ¶ 143.

Under the second alternative, local governments would be allowed to require a wireless provider to furnish: (1) in the case of non-categorically excluded facilities, the same information as under Alternative 1 (i.e., copies of RF-related documents submitted to the FCC in the licensing process); and (2) in the case of categorically excluded facilities, a demonstration of compliance with FCC RF rules. Id. at ¶ 144. As amplified by the NPRM's non-binding policy statement in this area, this demonstration of compliance could include (1) a verified

statement that the facility complies with FCC RF guidelines for both general population and occupational exposures; (2) an explanation as to how the provider determined that the facility will comply with FCC rules, a statement of actual values for predicted exposure and a comparison of actual exposure with FCC exposure limits; (3) an explanation of any access restrictions that will be maintained; and (4) a statement as to whether other significant transmitting services are nearby and what effect they may have. Id. at ¶ 146.

Of these two alternatives, the second, more detailed showing is far superior. We question, however, whether even that alternative provides sufficient assurance to the public of compliance with RF safety requirements. The Commission must recognize that public safety should always be entitled to greater weight than minimizing administrative burdens on providers.

Even the more detailed showing of alternative 2 may be inadequate for several reasons. First, while categorically excluded facilities by definition are supposed to pose less of a hazard, members of the public cannot be expected to understand such technical distinctions; they are entitled to be given reasonable assurance of compliance. Second, the Commission will not even know the precise location of most categorically excluded facilities. Indeed, due to the FCC's blanket licensing process for most wireless facilities, the Commission will not even know the location of many, if not most, new non-categorically excluded wireless facilities. When this fact is coupled with the fact

that the Commission lacks the resources and staff effectively to audit or check provider compliance with RF requirements, the result is a compliance system built almost entirely on trust rather than enforcement.

Although we do not doubt that most providers will try to be conscientious, the simple fact of life is that many new wireless providers are new ventures with little or no track record and facing enormous financial burdens.[9] When a financially pressed provider knows that a deviation from the FCC's RF rules is unlikely to be discovered by the FCC, and further knows that, unlike violation of structural safety requirements, excessive RF emissions only endanger the public subtly and over time and are thus unlikely to result in immediate and catastrophic liability to the provider, the provider may be tempted to cut corners to save costs.

Under these circumstances, the more detailed showing in the second NPRM alternative, as amplified by the criteria set forth in paragraph 146 of the NPRM, is the absolute minimum that the Commission should allow local governments to demand of wireless providers. It is far from clear, however, that these showings will be sufficient. For example, what if the local government is presented with evidence that calls into question the accuracy of the information furnished by the provider? Would, as the NPRM

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[9] See, e.g., FCC Report No. WT97-37, FCC Adopts Menu of Options for Modifying C Block Payments (released Sept. 25, 1997).

suggests, the local government be prohibited from seeking further evidence from the provider?

It is difficult to see how such a limitation would serve the interests of promoting public safety and providing the public with assurance of a provider's compliance with RF safety requirements. To the contrary, if the local government is placed in the position of telling the public that "We know evidence has been given to us casting doubt on the accuracy of the provider's information, but the FCC in Washington says we cannot ask the provider for more information," that will only arouse more public suspicion -- a suspicion, we might add, that is likely to be directed largely at the FCC and the provider. Surely such public distrust and suspicion is not in the interest of the Commission or industry.

We therefore propose that the second alternative showing, as amplified by paragraph 146, not be a ceiling on what a local government can require a provider to furnish. Rather, we urge the Commission to work with local governments to develop recommended RF compliance monitoring procedures that are more fully responsive to the public's expressed concerns on RF safety issues.

B. The Burden Should Be on the Wireless Provider, Not the Local Government, To Demonstrate Compliance with FCC RF Rules in Proceedings Before the FCC.

The NPRM's proposal (at ¶ 151) to adopt a rebuttable presumption that a wireless provider's facilities are in compliance with FCC RF rules in FCC relief proceedings under

Section 332(c)(7)(B)(v) is contrary to the statute, all general rules about presumptions, and common sense. The burden should be on the provider, not the local government, to show that its facilities are in compliance with FCC RF requirements.

As an initial matter, this approach is mandated by the statute. Section 332(c)(7)(B)(iv) sets forth two prerequisites for invoking the Commission's limited jurisdiction under subparagraph (v): (1) the local government's decision must "regulate" wireless facilities "on the basis of the environmental effects of [RF] emissions; and (2) those facilities must "comply with the Commission's regulations concerning such emissions."

Thus, unless a provider's facilities are in fact in compliance with the FCC's RF rules, the Commission literally has no jurisdiction to act under subparagraph (v). The Commission may not assume away this jurisdictional requirement, and thereby unilaterally expand its limited authority under Section 332(c)(7)(B)(iv)-(v), through the expedient of a presumption.

This reading of the statute also comports with general rules about presumptions and, perhaps most importantly, with common sense -- particularly where, as here, issues of public safety are at stake. As a general rule, the burden of proof is placed on the party with the best access to the evidence. That is surely the provider, not the local government. The provider -- not the local government -- has complete knowledge of the facility's location and characteristics, unfettered access to the property where it is located, and the necessary expertise (or ready access

to the necessary expertise) concerning radio engineering and measurement.

In such circumstances, placing the burden on the local government to demonstrate that a facility is not in compliance -- particularly where the NPRM also proposes to limit the information that the wireless provider may be required to furnish to the local government -- transforms the whole process into a shell game in which the provider is always the winner, and public safety is the loser. The shell game would work like this: On initial licensing, the FCC relies on the applicant's certification of compliance; the FCC has no staff or resources to audit or verify whether the facilities actually are in compliance; the local government must likewise rely on the provider's certification and what it provided to the FCC and cannot ask for more; and finally, when the provider petitions the FCC under subparagraph (v), it once again need not demonstrate compliance at all.

In short, nowhere in the process is there any effective, independent check on what should be a most important issue: whether the facilities in question do in fact comply with FCC RF requirements -- requirements that the Commission has found to be necessary for public safety.

The justifications offered in the NPRM for placing the burden on local governments do not withstand scrutiny. Most of the examples offered in the NPRM where the Commission presumes compliance with its rules (at ¶ 151 n.212 & ¶ 152) do not involve

matters of public safety, and certainly do not entail the strict FCC jurisdictional limitation set forth in Section 332(c)(7)(B). As for the NPRM's analogy to the FCC rule presumption that local regulation of small antennas is unreasonable, at least that presumption comports with the general rule about presumptions, since local governments presumably have better access than the provider to evidence about the health or safety need for a given regulation of small antennas.[10]

Here, in contrast, the Commission itself has already established the health and safety need for the RF emission rules. The only issue is whether a provider is complying with those requirements. Surely it is not unreasonable to require a provider affirmatively to demonstrate at some point in the process -- and it appears that review proceedings under Section 332(c)(7)(B)(iv)-(v) will be the only opportunity -- that its facilities are in fact compliant.

**CONCLUSION**

For the foregoing reasons, the Commission should (1) conclude that a local decision is not final until all local administrative review procedures have been exhausted; (2) leave to the courts responsibility for reviewing local decisions that

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[10] Indeed, the only apparent common denominator between the Commission's presumptions in the small antenna rules and the one proposed in the NPRM here is a troubling one: Both presumptions work against local governments and in favor of industry. We believe both reflect a disturbing Commission predilection to elevate the interests of industry over the health, safety and aesthetics interests of not only local governments, but of the citizens they are duty-bound to represent.

are allegedly "partially" based on RF emissions; (3) decline to review any local decision under Section 332(c)(7)(B)(iv)-(v) unless the decision is on its face based on RF emissions; (4) adopt the more detailed showing of RF compliance that local governments may require providers to furnish and address disputes where a local government has required more information on a case-by-case basis; and (5) place the burden on the wireless provider, not the local government, to demonstrate compliance with RF emission requirements in Commission proceedings under Section 332(c)(7)(B)(iv)-(v).

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